

## Palestine Pre-State Positioning on Family Law

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On a Monday morning at the end of December 1998, in downtown Gaza City, an articulate, professional woman from a prominent local family stood to address assembled journalists, politicians, women's rights activists, human rights workers, lawyers and other concerned (read: outraged) members of Palestinian civil society.

Instead of giving me justice, the *shari`a* court has decided I should return in shackles... I appeal to you today, in the name of all Palestinian women who have passed through this bitter experience, to stand by our side and support us in our demand to eliminate this despicable measure and review all other legal procedures that undermine the dignity and freedom of women.<sup>1</sup>

Married for 25 years, this woman had spent several months seeking a divorce through the Islamic courts which apply family law to Muslims in Gaza, only to be served with a notice ordering her to appear to answer a claim submitted by her husband for her to return to "the house of obedience". Outraged, Shadia Sarraj, herself the director of a women's education project, gathered considerable support around herself and took her case to the wider forum of social and political opinion. At the end of the press conference, heralded as the first of its kind, over sixty institutions signed up to the petition, beside the numerous individual signatories; a committee was set up and a popular campaign was being planned to remove the 'house of obedience' from the books.<sup>2</sup>

The "house of obedience" is a standard concept in traditional Islamic family law as codified and applied over much of the Middle East including in the Palestinian territories of the West Bank (including occupied East Jerusalem) and the Gaza Strip. In the gender-specific balance of rights and duties allocated by law to husband and wife, the wife owes her husband the duty of obedience in return for his financial support and protection of her. The "house of obedience" is the marital home, the physical location where the wife makes herself available to her husband, the legal assumption being that she is present in the marital home unless she has left it for a legitimate reason or with her husband's consent. The assumption of the law is that the husband is the wage-earner and provider. The husband has absolute financial responsibilities towards his wife under classical Islamic law: she is to be housed, clothed, fed and generally maintained at his expense regardless of her own financial means. The link between maintenance and 'obedience' is explicit: the only time a woman is not due maintenance from her husband is when she is found to be 'disobedient' (*nashiz*), and the only time a woman divorced by *talaq* (unilateral

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<sup>1</sup> Urgent Appeal to Public Opinion by S. Sarraj, reproduced in *Sawt al-Nisa'*, no.62, 12/31/98.

<sup>2</sup> *Sawt al-Nisa'* no. 62, 12/31/98.

‘repudiation’ by the husband) is not due maintenance during her *`idda* (waiting period during which she may not remarry) is when she is ‘divorced in disobedience’.<sup>3</sup> The maintenance/obedience equation can be seen in many ways as the fundamental regulating principle in the rules on marriage. There is also a link between dower and obedience, since a woman cannot be called to the house of obedience if her prompt dower has not been paid: her rights precede her duty of obedience.

The classical Muslim jurists set limits on the husband’s right of ‘obedience’, and these rules are stressed by writers defending the institution in recent times. The husband is not supposed to abuse his wife, or be arbitrary in his exercise of the right to his wife’s obedience. The jurist Abd el-Hamid identifies three conditions for the husband’s invocation of obedience (*ta`a*): 1) that the commands given by the husband concern marital affairs (not, for example, his wife’s personal financial affairs); 2) that they accord with the *shari`a*; and 3) that the husband has himself fulfilled his *shar`i* obligations towards his wife.<sup>4</sup> Within these limits, the wife is expected to be ‘obedient’. Quite what such ‘obedience’ involves is not always clear. In her discussion on Palestinian women and family law in the Gaza Strip, Islah Hassaniya gives an explanation part based on law and part on customary expectations:

By obedience is meant: that she obeys him in all lawful things, looks after herself and his property, doesn’t do things that annoy him, doesn’t scowl and doesn’t present herself [in public] in a manner displeasing to him.<sup>5</sup>

Hassaniya further points out that a wife is not due maintenance if she leaves her husband’s house for no [good] reason and without permission, travels in similar circumstances, goes to prison for crime or debt, or is a professional woman who goes out to work after her husband has told her not to.

It is this latter range of matters involving the physical whereabouts and movements of the wife that is the most significant in terms of court consideration of obedience: “the most obvious manifestation of obedience is that the wife lives in the marital home which the husband has prepared for her.”<sup>6</sup> It is when his wife has actually left the marital home that the husband may have recourse to the *shari`a* court to seek an award ordering her return to the ‘house of obedience’. Within the home, the classical jurists considered that the husband should be able to deal with his wife’s ‘disobedience’ as a private matter, although again within theoretical limits they sought to set on his ‘right of chastisement’.

Until relatively recently, in the West Bank and Gaza Strip as elsewhere, the authority of the state could be employed to implement a ruling for *ta`a* from the court, and the ‘disobedient’ wife might be forcibly escorted back to her husband’s house by

<sup>3</sup> Unless she has waived this right in a *khul`* agreement in which the couple divorce by mutual consent by a *talaq* from the husband in exchange for compensation from the wife - most commonly, in the West Bank and Gaza Strip, renouncing her rights to her deferred dower and maintenance during the *`idda*.

<sup>4</sup> M. M. Abd el-Hamid, *al-ahwal al-shakhsiyya fi al-shari`a al-islamiyya*, Beirut 1984, at p.116.

<sup>5</sup> Tarazi, Hassaniyya, Mukhallalati, and Sayigh, *al-mar`a al-falastiniyya wa`l-qanun fi qita` ghazza*, Gaza (UNWRA) 1994, at page 53-54.

<sup>6</sup> This was the explanation in the Explanatory Memorandum to the 1979 Egyptian legislation: B. A. Badran, *huquq al-awlad fi al-shari`a al-islamiyya wa`l-qanun*, Alexandria 1981, p. 214.

the local police. Although the institution of the 'house of obedience' has been under consideration by reformists in Arab states in recent years, it has mostly been addressed through removing the possibility of enforcement of this kind, rather than through addressing the concept of 'obedience' as such. The latter question has been tackled as much in court rulings as in legislation. It has been a case of whittling down the reach of the principle rather than eliminating it entirely. One of the reasons for this, clearly, is the central place of the maintenance/obedience equation in the gendered balance of spousal rights and duties in a Muslim marriage as expounded by all the classical jurists on whose writings the family laws of the Middle East are still, for the large part, based.

The outrage voiced in Gaza last December at the invocation of the house of obedience is evocative of attitudes elsewhere in the region where the personal status debate has been a focus of attention for civil society for a longer time. Writing in 1988, Egyptian commentator Fawzi al-Najjar observed that "[i]n recent years, most Egyptians have regarded the institution of the 'house of obedience' as a crude and embarrassing violation of civilised norms."<sup>7</sup> Al-Najjar describes the frustration of various attempts to abolish the concept of the "house of obedience" up until February 1967, when a ministerial decree suspending the enforcement of rulings for *ta'a* was issued: "in actual practice, this meant that the police would refuse to drag a woman back to her husband against her will".<sup>8</sup> There was opposition to both the 'tactic' (which opponents claimed was effectively amending the law through decree) and the implications of the decree, but it also found substantial support. The late Dr. Jamal Utayfi, for example, cited the supporting views of several *shar'i* scholars in Egypt, and stated that the forcible execution of *ta'a* contradicted the general principles of the Egyptian Constitution regarding personal freedom and respect for the family.<sup>9</sup> After the passage of the 1979 personal status legislation and replacement law in 1985<sup>10</sup> there was some claim that the institution of the 'house of obedience' had been eliminated, "to the great relief of many Egyptian women".<sup>11</sup> However, in effect it is only the forcible implementation that has actually been eliminated. In particular, the relationship between a married woman's right to work and her 'duty of obedience' to her husband is not fully resolved in the 1985 Egyptian law.<sup>12</sup>

<sup>7</sup> F. M. Najjar, 'Egypt's Laws of Personal Status' (1988) 10.3 *Arab Studies Quarterly* 319-344, at p.331. See also the article by M. al-Nowaihi, 'Changing the Law on Personal Status in Egypt with a Liberal Interpretation of the *Shari'a*,' *Middle East Review*, 11/4, 1979, pages 40-49, at page 44, referring to "the iniquitous Bayt al-*ta'a*".

<sup>8</sup> Najjar, 3 page 332; and see al-Nowaihi,

<sup>9</sup> In *al-Ahram*, 6/3/67, reproduced in the compilation of his articles, J. al-'Utayfi, *ara' fi al-shar'iyya wa fi'l-hurriya*, Cairo 1980, at pp. 355-359.

<sup>10</sup> A number of proposals to reform Islamic family law in Egypt were frustrated before finally in 1979 then President Anwar Sadat issued Law no.44 of 1979 by presidential decree. The constitutionality of the law was challenged (see below) and it was repealed in May 1985, to be replaced in July the same year by Law 100/1985 which incorporated most but not all the reforms of the 1979 law. See further below; and on what she calls 'the Egyptian family law saga' see N. Hijab, *Womanpower: The Arab debate on women at work*, Cambridge 1988 29-35.

<sup>11</sup> Najjar, *supra* note 3, p. 332. Published in the *Palestine Official Gazette (al-waqa'i' al-falastiniyya)* no.35 15 June 1954 as Order no.303 of 1954.

<sup>12</sup> Article 1 of the 1985 law provides: "Maintenance is not due the wife if she voluntarily holds back or refuses to deliver herself with no right, or is obliged to do so for some reason that is not from the husband's part, or if she goes out [of the marital home] without the consent of her husband. The wife's maintenance shall not be held to lapse by reason of her going out of the marital home without the

It remains similarly unresolved in the laws governing personal status for Muslims in the West Bank and Gaza Strip. The event in Gaza was significant in its own right as a forum for drawing attention to and mobilising sectors of civil society around the issue of “the house of obedience”.

It also reflects both the intense interest around personal status law that has built up in Palestine since the coming of the Palestinian Authority, reaching the streets in particularly heated debates last year; and the way in which the majority of those seeking to reform the law are approaching both the issue of framework as a whole, and particular issues of law. Palestine is poised on the brink of statehood<sup>13</sup> and the battle for the main ground in family law is increasingly waged by alliances who see in the outcome a stake in what sort of state it is going to be.

Personal status law in the West Bank, including East Jerusalem, and the Gaza Strip reflects the complex legal and political history of Palestine since the beginning of this century. The legacy of centuries of Ottoman rule, perpetuated by the British Mandate authorities, remains in the system of separate communal jurisdiction over personal status matters for the majority Muslim community and for the five recognised Christian sects.<sup>14</sup> The religious courts function alongside a system of regular civil and criminal courts - and are served by the execution offices of those courts.<sup>15</sup>

Ottoman heritage can also be traced in the laws that govern Muslim personal status. The Ottoman Law of Family Rights of 1917, the first codification of Islamic

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consent of her husband in such circumstances as are generally endorsed, whether by legal text or in custom or by reason of necessity, nor her going out to legitimate work, provided that it does not transpire that she is abusing this right, or that her exercise thereof is contrary to the interests of [her] family and her husband has asked her to refrain therefrom.” Article 1, Law 100/1985, Official Gazette no. 27 3 July 1985; reproduced in M. R. Abd el-Wahhab and H. A. Hassan, *al-ahwal al-shakhsiyya li'l-muslimin*, Cairo 1987. A subsequent article (11 bis 2) states that the wife is not entitled to maintenance if she refuses ‘obedience’ to her husband, defined as refusing to return to the marital home after her husband has called upon her to do so through the appropriate court channels. The article proceeds to set out how the wife may object to returning, providing for reconciliation procedures and failing this, finally, for the judge to grant a divorce with appropriate damages on whichever side is held responsible.

<sup>13</sup> Yasser Arafat’s concession to Western political opinion and pressure, and to the Israeli election process, in not declaring an independent state on 4th May this year, when the five-year interim period stipulated in the Oslo Accord came to an end, is known to be a delay rather than a cancellation. The declaration of the state (following the 1988 Declaration of Independence which preceded the current peace process) is a matter of time: even the European Union has given it a guarded welcome in advance for some time during the coming year. Questions of territory, population, real sovereignty over borders etc appear less resolved.

<sup>14</sup> Although al-Qasem points out that the Orthodox court is the only Christian court currently functioning in the Gaza Strip. A. al-Qasem, ‘Palestine’, (199708) 4 Yearbook of Islamic and Middle Eastern Law 291-296 at p.201 LYNN - CHECK REFERENCE

<sup>15</sup> From 1967, the military courts of the Israeli occupation authorities also functioned in the Occupied Palestinian Territories. Since 1994 the jurisdiction of the regular court system has been transferred to the Palestinian Authority under the terms of the various instrument of the Oslo Accords. For its part, the Palestinian Authority has set up and made use of a State Security Court much criticised by Palestinian and international human rights organisations.

family law, was applied under the British mandate authorities in Palestine<sup>16</sup> and continued to govern personal status matters for Muslims until after the *Nakba* (disaster) of 1947, when during the war that followed the British withdrawal hundreds of thousands of Palestinians fled, to become refugees in neighbouring Arab states, the state of Israel was declared holding possession of 70% of Mandatory Palestine, and what was left of Palestine came under Jordanian rule in the case of the West Bank and Egyptian administration in the case of the Gaza Strip. While Jordan moved to 'unify' the West Bank with the East Bank (Jordan proper) and issued national legislation to apply to both banks on the basis of its purported annexation, Egypt maintained the status of an administrator, appointing a Governor General to the Gaza Strip and issuing legislation specific to the Gaza Strip in the form of military orders. Unlike the courts in the West Bank, the Gaza courts were not integrated into the Egyptian national system. The *shari`a* courts in the Gaza Strip thus retained their jurisdiction over Muslim personal status; whereas in Egypt the *shari`a* courts and all other communal courts had been abolished in 1956 and their jurisdiction transferred to the national courts where the communal laws continue to be applied.<sup>17</sup>

Today, the *shari`a* courts in the West Bank apply the Jordanian Law of Personal Status (JLPS) of 1976 which replaced the 1951 Jordanian Law of Family Rights.<sup>18</sup> The fact that the *shari`a* courts in the West Bank (including East Jerusalem) apply legislation issued in Jordan after the 1967 Israeli occupation is an anomaly, since in all other areas the law was 'frozen' in its pre-occupation state, and Israeli military orders took the place of legislation.<sup>19</sup> The West Bank *shari`a* courts however refused to have anything to do with the Israeli authorities, protesting Israel's illegal annexation of East Jerusalem, its extension of Israeli municipal law to the annexed area and its refusal to recognise the validity of rulings from the Jordanian-administered *shari`a* courts there (the first instance *shari`a* court of East Jerusalem and the *Shari`a* Court of Appeal for the entire West Bank). The picture is further complicated by the fact that the Israeli authorities insisted that East Jerusalem Palestinians regulate their personal status affairs according to Israeli municipal law as applied by the Israeli *shari`a* court system, which for example prohibits polygamy, while for business anywhere else in the Arab world they would have to have their

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<sup>16</sup> By virtue of the Muslim Family Law (Application) Ordinance 1919, implementing both the OLF and its accompanying Law of Procedure for *Shari`a* Courts. The British repealed the sections in the OLF relating to Christians and Jews, while retaining in full the rest of the code which applied to Muslims. The recognised communities of Christians and Jews were expected to apply their own personal laws. C. A. Hooper, *The Civil Law of Palestine and Transjordan*, Volume II, Jerusalem 1936, at p.59

<sup>17</sup> For a full account of the abolition of the communal court system see N. Safran, 'The Abolition of the *Shari`a* Courts in Egypt' (1958) 48 *Muslim World* 20-28 and 125-135. Brown calls the Egyptian method 'amalgamation' of the *shari`a* courts by the state, while acknowledging that it amounted to abolition, and notes opposition to this move at the time by the Muslim Brotherhood and the personnel of the *shari`a* courts. N.J.Brown, (1997) 29 'Shari`a and State in the Modern Muslim Middle East,' *International Journal of Middle East Studies*, 359-376, at p.370.

<sup>18</sup> See J.N.D. Anderson, 'The Jordanian Law of Family Rights' (1952) 42 *Muslim World* 190-206. For a comparison of the JLF provisions with those of the 1976 Jordanian Law of Personal Status see L. Welchman, 'The Development of Islamic Family Law in the Legal System of Jordan' (1988) 37 *International and Comparative Law Quarterly* 868-886.

<sup>19</sup> See R. Shehadeh, *Occupier's Law: Israel and the West Bank*, (Washington Institute for Palestine Studies) 1988, for an account of the legal changes enacted by the Israeli occupation authorities after the 1967 occupation.

personal status affairs regulated by the East Jerusalem Jordanian-administered *shari`a* court applying Jordanian law.<sup>20</sup>

The *shari`a* courts in the West Bank thus continued to apply any legislation issued in Amman for the Jordanian *shari`a* courts, including the JLPS when it was promulgated in 1976. The JLPS made a number of significant amendments to the previous JLFR, and has itself been the subject of review and draft proposals for amendment since the 1980s.<sup>21</sup> In the Gaza Strip, the courts apply the Law of Family Rights of 1954, issued by the Egyptian Governor of the Strip.<sup>22</sup> The *shari`a* courts in Gaza do not apply post-1967 Egyptian law, so the personal status law promulgated in Cairo in 1979 and subsequently in 1985 has not been applied; nor did the 1954 Law of Family Rights constitute a codification of all Egyptian personal status legislation to that point, as it bears a much closer resemblance to the Ottoman Law of Family Rights 1917, which was never applied in Egypt.

Both the Jordanian law applying in the West Bank and the Egyptian-issued law applying in the Gaza Strip can be seen to be ultimately based on the OLFR 1917. Like that law, both introduce rulings from other Sunni schools of law besides the Hanafi in order to effect reforms within personal status law,<sup>23</sup> while Hanafi law remains the residual reference in the absence of a particular provision in the codified law.<sup>24</sup> In their general sweep the codes are as similar to each other as those of other Arab states, and maintain the characteristic, sturdily patriarchal and patrilineal outline of the classical Islamic rules. Thus, marriage is presented as a contract giving rise to rights and duties specific to each spouse; the husband must pay dower and maintenance to his wife, treat her well and provide a home for her; the wife must obey her husband in lawful matters, including moving to live with him if he moves, while

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<sup>20</sup> On the implications of these jurisdictional complexities for the work of the West Bank and East Jerusalem *shari`a* courts, see L. Welchman, 'Family Law under Occupation: Islamic Law and the Shari`a Courts in the West Bank' pages 93-115 in C. Mallat and J. Connors (eds.), *Islamic Family Law*, London 1990. On the family law applied to Palestinian Muslims inside Israel, see A. Layish, *Women and Islamic Law in a Non-Muslim State*, Jerusalem 1975.

<sup>21</sup> Published as Temporary Law no. 61 1976 in the Jordanian *Official Gazette (al-jarida al-rasmiyya)* no. 2668 1/12/76. The latest draft text for a law to replace the JLPS appears to date from September 1996: I am indebted to attorney Reem Abu Hassan for the text.

<sup>22</sup> Published in the *Palestine Official Gazette (al-waqa'i` al-falastiniyya)* no.35 15 June 1954 as Order no.303 of 1954.

<sup>23</sup> The 'selection' (*takahyyur*) of rules from other Sunni schools and less frequently of individuals jurists is a method of effecting reform within personal status law without appearing to depart from the rulings of classical Islamic jurisprudence. The OLFR was the first codification of Islamic family law and relied heavily on selection to widen the grounds on which a woman could seek divorce, for example. Extensive examples of the use made of this method of developing family law are given in J.N.D. Anderson, *Law Reform in the Muslim World*, London 1976. There is jurisprudential criticism that "the device of selection and amalgamation" is not "sustained by any type of cohesive legal methodology" - see W. Hallaq, *A History of Islamic Legal Theories*, Cambridge 1997, pp.210 -212. Nevertheless, *takahyyur* as a method of effecting change in the rules governing various areas of Muslim family law is widely accepted: see the citation from the first Palestinian Chief Islamic Justice quoted below.

<sup>24</sup> This is stated explicitly in Article 183 of the JLPS. Although there is no equivalent in the LFR, the Egyptian-issued Law of *Shari`a* Court Procedure ( no.12/1965, published in a 'special edition' of the Palestinian Official Gazette on 22/5/65) requires the *shari`a* courts in the Gaza Strip to issue rulings in accordance with the strongest Hanafi opinion unless there is a particular provision in the law stipulating the application of other rules. (Article 187).

maintaining freedom of disposal over her private income and property. Polygyny is permitted to a maximum of four wives. The marriage can be dissolved extra-judicially by the unilateral repudiation of the husband, by court decision on specific grounds presented by the wife<sup>25</sup> or by the court itself if the marriage has been concluded irregularly; or by mutual consent involving a final *talaq* by the husband in exchange for a financial consideration by the wife.<sup>26</sup> The mother is recognised as the natural custodian of her children until they reach specific ages, at which point, if their parents are separated, they are to return to the house of their father, who is recognised as their natural guardian. Guardianship by the father or other male agnate over females in marriage continues to be required in court if not unambiguously in law. Succession is governed by the classical Sunni rules which recognise female as well as male heirs but generally assign males double the portion of females.

Beyond this general picture, the separate post-1948 legal histories have meant different rules applying to the Muslim Palestinians of the West Bank and Gaza at different times, and there remain significant differences today. For example, in 1962 the 'obligatory bequest' became part of succession law applied in Gaza. This bequest addressed the problem posed by the fact that under the rules of classical Sunni inheritance law, the living sons of a parent who dies will exclude from succession any grandchildren of the dead parent through a son or daughter who has predeceased that parent. If the *propositus* has not thought to leave them a bequest within the third of the estate that the rules allow to be bequeathed, the orphaned grandchildren will receive nothing from the grandparent's estate. The obligatory bequest, first introduced in Egypt in the Law of Testamentary Dispositions of 1946, made orphaned grandchildren entitled to take the amount their dead parent would have inherited had he or she been alive, provided that this does not exceed one third of the estate.<sup>27</sup> In 1953, the Syrians took up this idea in their Law of Personal Status, but restricted it in two ways, applying it only to grandchildren through a dead son, and allowing them to inherit only the share they would have received out of their father's portion.<sup>28</sup> In 1962, the Egyptian rules were introduced in the Gaza Strip under Egyptian administration.<sup>29</sup> The West Bank, however, had no equivalent legislation until the JLPS 1976, which combined the Egyptian and Syrian versions, restricting the obligatory bequest to grandchildren through a dead son as in Syria, but allowing these to take the full amount of their father's share, as in Egypt, provided it does not exceed one third of the estate.

<sup>25</sup> And in certain circumstances (eg. breach of a stipulation in a marriage contract, or a disease preventing consummation of the marriage) by the husband.

<sup>26</sup> Recent research indicates that this is the most common form of divorce registered in both the West Bank and Gaza Strip. The *shari'a* courts in al-Khalil (Hebron), Dura, Nablus and Ramallah in the West Bank, and Gaza City and Rafah in the Gaza Strip, in the years 1989 and 1992-4, recorded an overall breakdown of deeds of or claims for divorce as follows: 67% *khul'*, 26% unilateral *talaq*, and 7% judicial divorce involving litigation (*tafriq/faskh*). Figures from field research by Fatima Mukhallalati, Reem Jabr, Hiyam Karkour and Ghada Shaheed for the Palestinian Women's Centre for Legal Aid and Counselling.

<sup>27</sup> Welchman, *op. cit. supra* n., at p.880. See N. J. Coulson, *A History of Islamic Law* (Edinburgh (1978 edition), pp.103 *et seq.*

<sup>28</sup> Article 257 of the Syrian Law of Personal Status, Law no. 59 of 17/9/53. On the obligatory bequest in this law, see J.N.D. Anderson, 'The Syrian Law of Personal Status' (1955) 17 *Bulletin of the School of Oriental and African Studies*, at p.47. The 1953 law has since been replaced with Law no.35 of 1975.

<sup>29</sup> Law no.13/1962, issued by the Governor General on 2/12/62.

Another change in the laws of succession that reached Gaza earlier than the West Bank was the application of the Islamic law of succession to the category of immovable property known as *miri* holdings, where the title is held by the ruler. In 1923 the British had implemented a 1913 Ottoman Law of Inheritance which gave males and females equal rights of inheritance to *miri* property, while leaving all *mulk* holdings (absolute private property) to devolve in accordance with the classical rules of Islamic law giving males generally twice the share of females.<sup>30</sup> In 1965 the Egyptian Governor General of the Gaza Strip ordered that the Islamic law of succession henceforth govern *miri* property, a step which was not taken in Jordan until 1990??? but which was then applied in the West Bank also.<sup>31</sup>

A particularly significant difference between personal status law in the West Bank and the Gaza Strip is in post-*`idda* maintenance for a wife divorced ‘arbitrarily’, or without reasonable cause. The classical Hanafi rules require a man who divorces his wife unilaterally by *talaq* to pay her maintenance during the *`idda* (‘waiting period’) and her deferred dower. This is the end of his financial obligations towards her, unless she is undertaking custody of their children.<sup>32</sup> The question of post *`idda* provision for divorcees was first taken up by Syria in its 1953 Law of Personal Status in an innovative provision which provided for compensation for the wife in the event of a *talaq* without reasonable cause that gives rise to damage and poverty for the wife; the maximum compensation was to be equivalent to her maintenance for a year, and was in addition to the maintenance that the husband was to pay during the *`idda*.<sup>33</sup> Subsequently a number of Arab states took up this provision in various ways in their codifications of Islamic family law<sup>34</sup> including the Jordanians, who included a provision similar to the Syrian one in the JLPS, allowing a maximum of one year’s maintenance as compensation to a woman divorced arbitrarily. Egypt however did not legislate on this matter until 1979; the replacement legislation in 1985 maintained the same provision, allowing for maintenance of at least two years to be awarded to a

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<sup>30</sup> The British also sought to extend the application of the Ottoman law somewhat. The Succession Ordinance required that the Ottoman law giving equal shares to males and females be the law applied by all religious and civil courts for all *miri* holdings. For *mulk* property the religious courts were expected to apply their own personal law, but while for Muslims *mulk* property could only be distributed according to traditional Islamic law, in the other communal courts the consent of all the concerned parties was required for the application of the personal law in intestacy, while on the request of one of the parties the issue would be regulated under the terms of the Ottoman Law of Inheritance for *miri* property. The Ottoman law thus became the only law applicable to *miri* land, and the residual law for *mulk* land of non-Muslims. F. M. Goadby, *International and Inter-religious Private Law in Palestine*, Jerusalem 1926, pp.121-4. For an explanation of land law written during the Mandate see F. M. Goadby and M. Doukhan, *The Land Law of Palestine*, Tel Aviv 1935

<sup>31</sup> Law no.1/1965, of 9/1/65.

<sup>32</sup> In which case he must pay for the children’s maintenance and pay his ex-wife a fee or wage for her services in undertaking custody. See

<sup>33</sup> The 1975 Syrian Law of Personal Status revised the maximum level of compensation upwards to three years’ maintenance: see Article 117.

<sup>34</sup> Morocco, Tunisia, Algeria, Libya, Kuwait, and Yemen all have variations of the provision, as well as the Jordanian and Egyptian provisions discussed here. Post-*`idda* maintenance has also been the subject of innovative court rulings and legislative enactments in South Asia: notably, in India, the Shah Bano case (*Ahmad Khan v. Shah Bano Begum* A.I.R.1985 S.C.945) followed by the Muslim Women (Protection of Rights on Divorce) 1986; and in Bangladesh, *Hezful Rahman v. Shamsun Nahar Begum* (1995) 15 B.L.D. 34, overturned in 1998. On the South Asian developments, see D. Pearl and W. Menski, *Muslim Family Law*, London 1998, pp.201-226.



women divorced without her consent for no reason on her part, as financial consolation.<sup>35</sup> There is no maximum limit set, and practice in the Egyptian courts has given the provision broader application than the Jordanian courts have contemplated.<sup>36</sup> Coming as it did long after the 1967 war, the Egyptian provision is not applied in the Gaza Strip, while the Jordanian does apply to the benefit of divorced wives in the West Bank.

This means, in effect, that a husband unilaterally divorcing his wife in the West Bank - but not in the Gaza Strip - risks having his motivation scrutinised and a financial penalty imposed by way of compensation to the divorcée.<sup>37</sup> Elsewhere in divorce law the Gaza legislation provides a remedy for abused wives that is denied in the West Bank, by providing for 'injury' or prejudice as grounds on which the wife is entitled to petition the court for judicial divorce. This provision in the Gaza law, and its equivalent (although different) provision in the West Bank legislation, are based on standard Maliki rules, but both provisions have adopted incomplete versions of the Maliki position. In the West Bank, the JLPS allows either spouse to apply for divorce on the grounds of 'discord and strife' (fundamental breakdown of the marriage), in line with the classical Maliki rules, while in the LFR in the Gaza Strip only the husband may apply on these grounds. On the other hand, the LFR takes another Maliki rule in allowing the wife to be granted a divorce by the court on establishing her husband's injury (*darar*) of her. It is only in the event of her failure to prove this injury that the case may be referred to arbitrators by the judge and proceed to a divorce on the grounds of strife or breakdown if the arbitrators are unable to reconcile

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<sup>35</sup> The Jordanian and Syrian laws use the term *ta'wid*, translated here as compensation, while the Egyptian term is *mut'a*, translated here as 'consolation'. The institution of *mut'a* has origins in classical interpretations of Islamic law which are drawn on by the Syrians and Jordanians as much as the Egyptians and others in justifying what could otherwise be seen as additional financial obligations on the Muslim husband: this is the case in the Explanatory Memoranda to both the JLPS and the Egyptian legislation. The Syrian and Jordanian approach stresses also however on the idea of a financial penalty levied on the husband for his abuse of a right - that is, his right of *talaq*. See A. Al-Qasem, 'The Unlawful Exercise of Rights in the Civil Codes of the Arab Countries of the Middle East', (1990) 39 I.C.L.Q. 396-412, where he considers the issue of compensation for abuse of the right to divorce, at p.400.

<sup>36</sup> Notably, in allowing the *mut'a* to be awarded to women who have obtained a divorce through the court on the grounds of injury; the courts have argued that the judge is in effect acting in place of the husband in such cases, in divorcing the woman from him, and the fact that she has sought the divorce in the grounds of injury makes it against her consent. See Dawoul El Alami, 'Mut'at al-Talaq under Egyptian and Jordanian Law', (1996) 3 *Yearbook of Islamic and Middle Eastern Law* 54-61, at p.57.

<sup>37</sup> According to the classical interpretations of Islamic law, the husband has the power of *talaq* and need not in law provide a reason for exercising it; though in the 'disapproved' category of acts, an unjustified *talaq* is nevertheless legally valid. It should be noted that an award to the divorced woman for compensation for arbitrary *talaq* depends upon a claim being submitted by her, while court practice both in Jordan and in the West Bank has established a legal presumption that unilateral repudiation (*talaq*) is arbitrary, since there is no record of the wife's consent, and have placed the burden of overturning that presumption firmly with the husband, who must establish to the court's satisfaction that there was a good reason for the *talaq*. This principle was established soon after promulgation of the JLPS, as clarified in the following ruling from the Amman *Shari'a* Court of Appeal:

The woman does not have to prove her claim that the *talaq* was arbitrary, since *talaq* is fundamentally disapproved; it shall be considered arbitrary so long as it was not pronounced for a good reason, and a divorcer who claims that he did have a good reason must prove this defence.

Amman 1985/78, in M. al-'Arabi, *al-mabadi' al-qada'iyya li mahkamat al-isti'naf al-shar'iyya* (Judicial Principles of the *Shari'a* Appeal Court) Volume II Amman 1984, at p.59.

the couple. In the West Bank, by contrast, if a woman successfully establishes her husband's injury of her, the judge is to "warn the husband to improve his behaviour" and if he does not, then to transfer the matter to arbitrators.<sup>38</sup> In both cases, if their attempts at reconciliation fail, the arbitrators are empowered to recommend that the judge divorce them specifying the proportions of blame attached to each spouse so that the judge can order a proportionate financial settlement.

Here, the significance in the difference between the laws does not appear to extend to practice. In an examination of the records of four *shari'a* courts in the West Bank for the years 1989 and 1992-4, claims for judicial divorce based on the grounds of 'discord and strife' accounted for 8% of all claims for judicial divorce, behind the more common grounds of failure of the husband to maintain the wife and the injurious absence of the husband for over a year.<sup>39</sup> On the other hand, the *shari'a* courts records in Gaza City and Rafah for the same four years failed to reveal a single claim for divorce submitted on the grounds of injury. Nevertheless, the fact that divorce for injury is on the books in Gaza stands to hold a certain protective potential: by contrast, in Egypt and Morocco, where provisions similar to that in the Gaza law are included in the personal status legislation, research indicates that injury is the second most common ground on the basis of which women submit claims for divorce to the courts, with the judges giving it a broad interpretation.<sup>40</sup>

Finally, there are significant differences between the law governing both the maximum age of custody and the minimum age of marriage. For the first, classical Hanafi law presumes the mother to be the natural custodian of her minor children until the boy reaches the age of seven and the girl nine, after which the children return

<sup>38</sup> JLPS Article 132 a): "If the application [for divorce] is from the wife and she establishes her husband's injury of her, the judge shall do his utmost to reconcile the couple. If he fails, then he shall warn the husband to improve his behaviour with his wife, and shall postpone the claim for a period of not less than one month; and if reconciliation has not occurred, then the matter shall be transferred to two arbiters.."

LFR Article 97: "If the wife claims that her husband has inflicted injury upon her to an extent that persons like her cannot continue in the marriage, she may seek divorce from the judge. If the injury is established and the judge is unable to reconcile the couple, he shall divorce her [from her husband] by a final talaq. If her application is rejected by subsequently [her] complaints are renewed, yet the injury is [still] not proven, the judge shall appoint two arbitrators and proceed in the manner set out in Articles 98 - 102....." [Author's translation]

<sup>39</sup> Respectively, 59% and 27.5% of claims. The remainder of claims for judicial divorce were submitted on grounds of a prison sentence against the husband for three years or more, and dangerous and contagious disease. See L. Welchman, *Islamic Family Law: Text and Practice in Palestine*, Jerusalem 1999 (forthcoming by the Palestinian Women's Centre for Legal Aid and Counselling).

<sup>40</sup> Mir-Hosseini found in two Moroccan courts that the most common basis for judicial divorce was absence of the husband causing injury to the wife (47% of all claims) with injury as the second most common claim (21% of claims): Z. Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law, Iran and Morocco Compared*, London 1993, page 102 table 3:7. Shmais found 24% of claims by women in Cairo 1972-82 for divorce to be based on grounds of injury, second to those for absence of the husband causing injury to the wife at 49.9%: A. Shmais, 'al-'aqabat allati tu'awwiq husul al-mar'a al-muslima 'ala al-talaq al-qada'i fi misr' (Obstacles which prevent Muslim women getting a judicial divorce in Egypt), unpublished paper based on Ph.D. thesis at the University of Paris 1987. Shaham in a study of applications for divorce by women in Egypt in earlier decades found about 50% to be based on the grounds of injury, concluding that "the Egyptian qadis fulfilled the expectation of the legislators by interpreting injury broadly", with the ground of general injury in his view providing a "residual grounds for divorce". R. Shaham, 'Judicial Divorce at the Wife's Initiative: The Shari'a Courts of Egypt 1920-1955' (1994) 1.2 *Islamic Law and Society* 217-253 at p.251.

to their father as the natural guardian (*wali*).<sup>41</sup> In 1976 the Jordanians extended the custody of the mother “who has devoted herself to the upbringing and custody of her children” to puberty - that is, when the children physically reach puberty. The custody of a woman other than the mother was extended the ages of nine for boys and and twelve for girls. The Explanatory Memorandum to the JLPS stated that the Maliki rules on which this change was partially based were seen as more suitable for the present age than the more constraining Hanafi position.<sup>42</sup> In the Gaza Strip, on the other hand, the classical Hanafi rules are maintained, allowing only the limited extension of the custody of the mother for a girl up to eleven years and a boy up to eleven.<sup>43</sup> In Egypt, the Hanafi position has been amended to allow for the extension of custody until the boy reaches fifteen years old (the presumed maximum age of puberty according to the classical law) and for the girl until she marries (the standard Maliki position), in cases where the interest of the wards requires it.<sup>44</sup>

While in regard to the age of custody the Egyptian reforms were not enacted until after the Israeli occupation, in the case of the age of capacity for marriage they had promulgated substantial reforms in 1923 and 1931, establishing sixteen for females and eighteen for males as the minimum ages at which marriage could be registered and recognised by the state.<sup>45</sup> However, in the LFR 1954, rather than codifying these rules, the Egyptian authorities reproduced the existing provisions of the OLFR of 1917. The Ottoman law, in provisions that were innovative for their time, had set capacity for marriage at the ages of eighteen for the male and seventeen for the female, but allowed the judge to give permission for marriage below that provided the applicant had reached puberty and in the case of the female her guardian gave permission for her marriage.<sup>46</sup> No marriage was allowed below the ages of twelve for the boy and nine for the girl. By the time these rules were reproduced in the law the Egyptians issued for Gaza, Jordanian law had already raised the minimum age to fifteen for both spouses, with the judge being allowed to authorise marriage from that age up to the ages of full capacity of eighteen for males and seventeen for females - again, provided the female had the consent of her guardian.<sup>47</sup> In 1976 this

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<sup>41</sup> Provided she meets certain conditions related to mental, physical and moral capacity to bring up children, and does not marry a man outside certain very close degrees of relationship to the child. The strict gendering of the parental roles between the mother as custodian, physically nurturing and looking after the child for a temporary period in their youth, and the father as guardian, with more enduring authority and decision-making over the persons and property of his children, has historically been able to accommodate a certain degree of flexibility with a view to the welfare and best interest of the child as evaluated by the (male) judge within his culture and community. See J. Tucker, *In the House of the Law: Gender and Islamic Law in Syria and Palestine 17th - 18th Centuries*, Berkley 1997, pp.113-147.

<sup>42</sup> JLPS Articles 161 and 162.

<sup>43</sup> LFR Article 118.

<sup>44</sup> Article 20 of the Egyptian Law no.25/1929 as amended by Law no.100/1985.

<sup>45</sup> This was done through procedural means rather than as a matter of substantive law, through Law no.56/1923 and Law no.78/1931. Marriages below this age are not per se invalidated. For a review of Egyptian law and practice 1920-1955 see R. Shaham, ‘Custom, Islamic Law, and Statutory Legislation: Marriage Registration and Minimum Age at Marriage in the Egyptian Shari’a Courts’ (1995) 2,3 *Islamic Law and Society* pp.258-281. Kuwait has taken the Egyptian procedural approach in its 1984 law, but most other codifications in the Arab world have set specific ages as a matter of substantive law - although not necessarily rendering marriages below the set minimum ages necessarily invalid - see below on Jordan.

<sup>46</sup> OLFR Articles 4-7.

<sup>47</sup> JLFR Article 4.

was amended to sixteen for the male, who no longer needs the judge's permission to marry once he has reached that age, while the female of fifteen has reached capacity for marriage but is still required to have either her guardian's or the court's consent until she is eighteen.<sup>48</sup> One final point that needs to be made here is that according to the explicit text of both the LFR and the JLPS, the ages are calculated according to the lunar year - so the minimum age of marriage for the female in the West Bank is around fourteen years and seven months by the solar calendar.

The disparity in the ages of marriage at which Muslim Palestinians in the West Bank and Gaza Strip were allowed to marry was the first (and at least until the end of 1998 the only) area of Muslim family law to be addressed by the Palestinian Authority, or more specifically by one of its ministers, the Chief Islamic Justice (Qadi al-Quda).<sup>49</sup> Appointed from the Tunis base of the Palestine Liberation Organisation two days after the signing of the Gaza-Jericho Agreement which paved the way for Yasser Arafat's triumphal entry into Gaza to head the Palestinian Authority,<sup>50</sup> Shaykh Muhammad Sardane set about rehabilitating the *shari`a* court system and the *shar`i* judiciary, particularly in the Gaza Strip, and made a number of statements about the need to unify the laws in the two regions. In December 1995 he issued an administrative decision which in its preamble drew attention to the "social, medical and humanitarian injury that results from the marriage of youngsters below the age of puberty as occurs in the *shari`a* courts of the Gaza Strip" and proceeded to set the

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<sup>48</sup> JLPS Articles 5 and 6. There is a confusion in the JLPS on whether in fact the *wali's* consent is required by the female up to the age of 17 or 18 - see Articles 6, 13 and 22, and whether his consent, or that of the court in the event that he is wrongly withholding his consent, continues to be required in every case of a woman's first marriage. Two commentators on the law come to opposite conclusions in this regard: M. Samara, *sharh muqarin li-qanun al-ahwal al-shakhsiyya* (Comparative commentary on the law of personal status) Jerusalem 1987 p.119 on the basis of Article 9, 10 and 13; and M. Sirtawi, *sharh qanun al-ahwal al-shakhsiyya al-urduni* (Commentary on the Jordanian Law of Personal Status) Amman 1981, p.115, on the basis of Articles 13 and 22. The one point on which the JLPS is explicit is that a sane adult previously married woman aged over eighteen does not need the consent of a guardian to her marriage. In practice, this makes very little difference: the *shari`a* courts routinely record the consent of the woman's guardian to her marriage whether or not it is technically required and indeed in cases where it unequivocally is not. This clearly indicates that custom is stronger than law in upholding the authority of the patriarch over the females of his family: for comparison in Pakistan see S. S. Ali, 'Is an Adult Muslim Sui Juris? Some Reflections on the Concept of 'Consent in Marriage' without a Wali, with particular reference to the Saima Waheed Case' (1996) 3 *Yearbook of Islamic and Middle Eastern Law* 156-174, at p.165. However, women may also perceive and exploit the involvement of their guardian as representing the support and strength of their own families vis-a-vis that of the husband's, adding to their weight and position in the new family. I am indebted to students on the Gender, Law and Development course at Birzeit University for enlightening discussions of this and other areas of law in April 1999.

<sup>49</sup> This does not include the issual and distribution to the *shar`ia* courts under the Palestinian Authority of unified forms of standard documents used by the courts such as marriage contracts, deeds of agency, deeds of increase in dower and so forth. In a 1996 interview, the Qadi al-Quda stated that 27 separate standard forms had been issued under his supervision: *Al-Hayat al-Jadida* 26/1/96.

<sup>50</sup> Shaykh Muhammad Abu Sardane was originally appointed as *wakil* responsible for the *shari`a* courts within the Ministry of Justice, but by October Yasser Arafat agreed that there be a post of Qadi al-Quda with the rank of Minister, directing a Department separate from the Ministry of Justice. Respectively, decisions of 6/5/94 and 18/10/94, reproduced in M. H. Abu Sardane, *al-qada al-shar`i fi `ahd al-sulta al-wataniyya al-falastiniyya*, (The *Shar`i* judiciary under the Palestinian National Authority) Gaza 1996, at pages 53 and 93. I am indebted to His Honour Shaykh Taysir Tamimi, current Acting Qadi al-Quda, for a copy of this book.

minimum age of marriage for females at fifteen and males at sixteen lunar years and to prohibit the judges from marrying any persons below these ages.<sup>51</sup>

Basically what the Qadi al-Quda did here was to bring the law in Gaza into conformity with the law in the West Bank,<sup>52</sup> his tendency being clearly to take the Jordanian law applied there as the model for a unified and modernised Palestinian law.<sup>53</sup> For a number of groups in Palestinian civil society, however, the standards set in Jordanian law are not those to which they aspire. In particular, concern over the early marriage of women has included examination of the socio-economic and health ramifications as well as attempts to assess the extent of early marriage. A wide-ranging demographic survey by the Palestinian Central Bureau of Statistics published in 1996 found the average age of marriage for men to be 23, and for women 18.<sup>54</sup> In 1998, an extensive study of the phenomenon of early marriage in Gaza found that 41.8% of females in their survey married between the ages of 12-17, with 13.3% marrying under the age of 15.<sup>55</sup> In the summer of 1998 the Women's Affairs Technical Committee, an umbrella group representing a number of politically affiliated women's organisations, launched a national campaign to raise the age of marriage to eighteen.<sup>56</sup>

Just as the Qadi al-Quda sought to raise the minimum age of marriage in the Gaza Strip by means of an administrative decision, it is theoretically possible that another administrative decree could be issued raising it further; or that the Palestinian Legislative Council could pass a law addressing this specific area of personal status law. Since the establishment of the Palestinian Authority and the election of the Palestinian Legislative Council, a number of lobbying targets have been achieved by the women's movement as a result of high-profile and energetic issue-specific campaigns. By way of example, these include a Directive circulated by the Ministry of the Interior in the PA clarifying that a married woman does not need her husband's approval to apply for a Palestinian passport, nor an adult (over 18) single female her (male) guardian's consent; and, on a more local level, the Ministry of Transport's climbdown over requiring unmarried women to be accompanied by a relative for driving lessons in Ramallah.<sup>57</sup> The vulnerability of these achievements lies in the fact

<sup>51</sup> Administrative Decision of the Qadi al-Quda no.78/95 of 25/12/95, valid as of 10/1/96; text reproduced in M. Abu Sardane, *op cit supra* n. at p. 185.

<sup>52</sup> Except that the administrative decision in Gaza required a male aged 16-18 and a female aged 15-17 to have their marriage authorised by the *qadi*, in a provision resonant of the JLFR 1951 rather than the current JLPS provision.

<sup>53</sup> See M. Abu Sardane, *op cit supra* n. at p.49; and interviewed in *Al-Quds* 14/8/94 and *Al-Hayat al-Jadida*, 26/1/96. He himself had been an employee in the Jordanian *shar'i* system, clearly regarded the Law of Family Rights applied in Gaza as inferior to the JLPS and blamed neglect of the Gazan system under the Israeli occupation for a deterioration of *shar'i* affairs there compared to the West Bank where the *shari'a* courts had maintained 'direct links' with the Jordanian *shari'a* system.

<sup>54</sup> *Palestine Report* 16/2/96.

<sup>55</sup> Mundhir `Imad and Iman Radwan, 'al-zawaj al-mubakkir fi'l-mujtama' al-falastini' (Early marriage in Palestinian society - summary) Women's Affairs Centre, Gaza City 1998.

<sup>56</sup> *Sawt al-Nisa'* 62 31/12/98. Just after the election of the PLC in 1996 the WATC had issued a statement identifying the marriage age of 18 as a lobbying priority.

<sup>57</sup> Respectively, PNA Ministry of Interior, Passports and Nationality Department, General Directive of 12/3/96; and PNA Ministry of Transportation, Directive 913 of 18/7/96. I am indebted to Suheir Azzouni, Director of the Womens' Action Technical Committee, for the texts.

that most have been effected by way of regulations or directives issued by PA officials, rather than by way of law passed by the PLC.

Partly this is due to the PLC's "inability to assume the responsibilities granted to it by the Palestinian people and to have a meaningful effect on Palestinian life", as described by the Palestinian Independent Commission for Citizens' Rights, which has severely criticised the executive for impeding the activities of the PLC.<sup>58</sup> The clearest example of this is probably the 'flagship' legislation of the Basic Law for the transitional period. The Basic Law, a sort of draft interim constitution, attracted wideranging discussions in Palestinian civil society, particularly on the guarantee of human rights and the rule of law, and the structuring of relations between the executive, legislative and judicial authorities. It was widely seen not only as vital for the transitional period but as indicative of things to come in a future Palestinian state, and it proved highly contentious for the executive.<sup>59</sup> Despite having passed its third reading by the PLC in October 1997, by the formal end of the interim period on 4th May 1999 the Basic Law had still not received ratification by the head of the Palestinian Authority, Yasser Arafat.

As for family law, a number of issues come together when those who wish to see changes consider their strategies. These can be illustrated by the current debate over the house of obedience. As noted above, Egypt put an end to the forcible execution of obedience rulings by ministerial decree a few months before the war in 1967,<sup>60</sup> and while the 1985 legislation does not 'eliminate' the house of obedience, it clearly does not contemplate forcible implementation. In 1976 the Jordanians effected the same change in legislation, with the substitution of one verb in Arabic, changing

<sup>58</sup> See for example the PICCR's Third Annual Report covering calendar year 1997, at p.55:

The relationship between the PLC and the Executive Branch was not properly defined during 1997. Rather, the Executive Branch acted to impede the PLC's activities by failing to implement legislation or fully acceding to the PLC's recommendations in connection with PLC oversight of the Executive Branch.

<sup>59</sup> The Basic Law was first drafted under the supervision of Anis al-Qasem for the Legal Committee of the Palestine Liberation Organisation following the Declaration of Independence by the PLO in 1988. After the Gaza-Jericho Agreement was signed in 1994, the draft was subjected to widespread consultation and public debate in Palestine and went through a number of different drafts until the elections for the Palestinian Legislative Council in January 1996. In the summer of 1996 the PLC published its own first draft in the local and international Arabic press, and the final version passed its third reading on 2/10/98. See J. Oyediran and M. Gangat, *huquq al-insan fi muswada mashru' al-nizam al-daturi li'l-sulta al wataniyya fi'l-marhala al-intiqaliyya*, (Human rights in the draft constitution of the National Authority in the transitional period) al-Haq (Ramallah) 1996; A.B.T. Chase, 'The Palestinian Authority Draft Constitution: Possibilities and Realities in the Search for Alternative Models of State Formation', IPCRI Law and Development Program paper no.4, Jerusalem 1997; A. Al-Qasem, 'Commentary on the Draft Basic Law for the Palestinian National Authority in the Transitional Period' (1992-4) 7 *Palestine Yearbook of International Law* 187-211; and for comparison, A.C. Wing, 'The New South African Constitution: An Example for Palestinian Consideration', (1992-4) 7 *Palestine Yearbook of International Law* 105-30. Unofficial English translations of the final (4th) draft under al-Qasem's supervision and the final text passed by the PLC are published respectively by Jerusalem Media and Communication Centre (Draft Basic Law, February 1996) and LAW - Palestinian Society for the Protection of Human Rights and the Environment (Basic Law Draft Resolution, October 1997).

<sup>60</sup> According to al-Najjar, when the Minister was challenged on the admissability of this action, the speaker asked the National Assembly if there was anyone present who would support forcible execution of a ta'a ruling by police action, whereupon everybody in the chamber shouted 'No, no!' Majjar comments that "[n]o one wanted to go on record as being in favour of such a shameful institution!" F. Najjar, *op cit supra* n. at p.331.

the 1951 text from “the wife shall be obliged to obey her husband” to “the wife shall obey her husband” in the JLPS.<sup>61</sup> Thus the effect of a ruling for his wife to return to the house of obedience obtained by a husband from the *shari`a* court is most immediately confined to implications for her maintenance rights, which are suspended until she can establish she has complied with the *ta`a* ruling and her status as a ‘disobedient’ wife (*nashiz*) has thereby been removed. If her husband in the meantime divorces her, she will not be due maintenance during the ‘*idda*’.

Actions by a husband for the court to order his wife back to the house of obedience appear to have been on the decrease in recent decades, probably as a result both of the impossibility of physical enforcement and of the growing social disapproval of the institution noted above. Thus, research in West Bank *shari`a* court records for 1965, 1975 and 1985 showed claims for *ta`a* constituting 16%, 11% and 5% respectively,<sup>62</sup> while research from the 1990’s including two courts in Gaza found them constituting 3.5% of claims.<sup>63</sup> In most cases it seems that a *ta`a* claim will be submitted by the husband in defence to a maintenance claim by the wife, or as part of a series of other claims between the two in the *shari`a* court - in other words, often as a negotiating ambit. This is often the case in the proceedings of a claim by either party for divorce on the grounds of ‘discord and strife’ as well as in response to a maintenance claim from the wife.<sup>64</sup> However, in 1994, the summer the PLO forces marched into Gaza and Jericho, there was an upsurge in both maintenance claims and in claims for *ta`a*, the one clearly related to the other and both possibly to be traced to a perception that with the Palestinian Authority there was more possibility of enforcement, particularly of financial claims.<sup>65</sup>

For clarification purposes, it would be well within the power of the executive to ensure that *ta`a* rulings in the Gaza Strip are not forcibly executed by giving appropriate administrative instructions to the police. This would not, however “eliminate the house of obedience”, since the wife’s duty of obedience is enshrined in both the JLPS and the LFR,<sup>66</sup> and sits more or less centrally to the discussions of the structure of the marital relationship in Islamic law. This is where a second very significant aspect of the Shadia Sarraj example comes in: namely, the way in which the arguments were addressed by supporters of the campaign she mobilised. In its fortnightly women’s supplement, *Sawt Al-Nisa* (Women’s Voice), the Women’s Affairs Technical Committee devoted several column inches to exponents of the view that the concept of the house of obedience is not based on explicit texts of the Qur’an

<sup>61</sup> Compare JLFR Article 33 and JLPS Article 37.

<sup>62</sup> Courts of Bethlehem, Ramallah and Hebron. L. Welchman, *The Islamic Law of Marriage and Divorce in the Occupied West Bank*, Ph.D. London (SOAS) 1992, table 16 at p.219.

<sup>63</sup> Statistics from data collected by WCLAC researchers see *supra* n.

<sup>64</sup> Court practice has established that consideration of a claim for *ta`a* by the husband will be suspended if the wife claims the existence of strife, until the wife’s claim has been investigated. M.H. al-`Arabi, *op cit supra* n. at p.227, Appeal Court ruling no. 18906/1976. Compare Mir-Hosseini on *ta`a* and maintenance claims in Morocco: “Women resort to court to improve their bargaining position vis-à-vis their husbands. Men come to court to offset -- or preempt -- their wives’ actions. *Op cit supra* no. at p.50.

<sup>65</sup> Although the Gaza City court showed an increase in maintenance claims, it was only the Rafah court that showed a surge in *ta`a* claims that there, and a more informed understanding of that phenomenon awaits further research.

<sup>66</sup> JLPS Articles 37 and 39; LFR Article 40.

or the practice of the prophet Muhammad (the two textual sources of Islamic law) but is rather a matter of human interpretation. The extensive examination of the Islamic law argument is indicative of recent debates in Palestine regarding the nature of a future Palestinian law of personal status, debates which focus on the authority or authorities from which such a law should be drawn.

The spring of 1998 saw a series of high-profile and carefully prepared activities by wide sections of the women's movement, which drew attention to areas of gender inequality in law. Of particular significance was the culmination of a wide-ranging project called the Palestinian Model Parliament: Women and Legislation (PMP), organised by a non-governmental women's centre, the Women's Centre for Legal Aid and Counselling (WCLAC). Running over a period of nearly two years, the prize-winning project had sought to identify in all areas of the law those provisions discriminatory to women's rights and to draft, debate and build consensus on proposed amendments to those provisions, to be forwarded for the attention of the Palestinian Legislative Council. A study by a lawyer published by the WCLAC in the lead-up to the final sessions of the Model Parliament in the West Bank and Gaza,<sup>67</sup> and a set of draft proposals for modifications to personal status law drawn up for discussion in the Gaza final session,<sup>68</sup> received particular attention in the press and elsewhere. The vehemence and indeed virulence of the reaction from particular Islamist quarters against the questions being raised in these documents, and in the debates in the Model Parliament as a whole, translated into personal attacks on many of the women involved and provoked a counter-mobilisation of support across broader areas of civil society. Those joining the debate from various perspectives raised issues related to the place of Islam and Islamic law in the cultural heritage of Palestine, the meaning of democracy and pluralism and its history in Palestinian society and in the revolution, the protection of freedom of expression, women's rights and the nationalist struggle.

In the meantime, and in direct response to the activities of the PMP, the Acting Qadi al-Quda, undertaking the functions of the Qadi al-Quda during the latter's extended absence from the country, announced the establishment of a committee to draw up a draft personal status law as a matter of priority, inviting submissions from all those concerned with the matter,<sup>69</sup> although not addressing the women's organisations that had been involved in the PMP. The question of authoritative framework is not an issue for this committee, which will draw on the rules of classical Islamic law while asserting its right to exercise independent judgement on matters traditionally held to be matters of human interpretation.

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<sup>67</sup> A. Khadr, *al-qanun wa mustaqbil al-mar'a al-falastiniyya* (The law and the future of Palestinian women) WCLAC 1998.

<sup>68</sup> K. Nashwan, 'muswada muqtadayat li-qanun ahwal shakhsiyya falastini muwahhad' (draft requirements for a unified Palestinian personal status law), discussion paper presented to the Palestinian Model Parliament, Gaza City, April 1998; I am grateful to Karam Nashwan for the text and to Marwa Qasim and Maha Abu Dayyeh for inviting me to attend the final session of the PMP in Gaza. Much of the argumentation of the Gaza PMP document is reproduced in Z. Uthman, 'al-barliman al-falastini as-suri: al-mar'a wa'l-tashri', bayn al-tajdid wa'l-quliba' (The Palestinian Model Parliament: Women and Legislation - between renewal and stereotyping) (1998) 5,9 *al-siyasa al-falastiniyya* (Palestine Policy) 57-85.

<sup>69</sup> *Al-Ayyam* 4/4/98.



For those who were involved in the PMP, the political women's movement and other sectors of civil society involved in parallel discussions on the way forward in family law, the options are more complex. One of the reasons the study published by WCLAC was attacked was that it argued that optimally a unified civil code embodying the principle of gender equality should regulate family affairs for all Palestinians regardless of religion, and that the religious authorities should maintain a guiding and counselling role but no longer have a legislative or judicial role in personal status matters.<sup>70</sup> Although she conceded that this was not going to happen in the short term,<sup>71</sup> she insisted on the principle of gender equality as the basic authoritative principle in reformulating family law. In the Gaza PMP discussion document, a similar emphasis was laid on the fact that the personal status laws being criticised are "inherited laws" - that is, not issued by Palestinians for Palestinians - and that a Palestinian law must conform to the spirit of the 1988 Declaration of Independence and to the guarantee of gender equality made in the draft Basic Law,<sup>72</sup> as well as having regard for international human rights law in general and the Convention of the Elimination of All Forms of Discrimination against Women in particular. At the same time, the document proposed development of Muslim family law within the Islamic framework, stating that the *shari`a* is a principal source of personal status law and claiming the space for interpretations of the sources beyond the classical rules to give substance to the principles of equality and justice.

The majority tendency outside the *shar`i* system itself thus appears to favour working within the broad limits set by tradition and culture, which includes a role for religion in personal status law: a 'Muslim feminist' approach as defined in the Egyptian context by Azza Karam.<sup>73</sup> The internal cogency of this approach is illustrated by what happened with the relevant provisions in the draft Basic Law. Commenting on the extensive debates on the draft text that he had originally presented 1994, drafter and PLO legal adviser Anis al-Qasem noted that women's organizations had raised questions to do with personal status issues, but that "[i]t was explained and accepted that a basic law was not the place for such subjects and that that had to be attended to in special legislation." In similar vein he explained the absence, in his draft texts, of any reference to the place of Islamic law in the Palestinian legislative process:

The Draft intentionally avoided the inclusion of issues that may be divisive at this stage within the Palestinian community, such as the religion of the state, the sources of legislation and boundaries. It has

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<sup>70</sup> Khadr, *op cit supra* no., 118-120.

<sup>71</sup> Compare the failure that same summer of 1998 of the Lebanese Bill for "optional civil marriage": C. Mallat, 'Lebanon', 297-301 in (1997-8) 4 *Yearbook of Islamic and Middle Eastern Law*, and N.M.El-Cheikh, 'The 1998 Proposed Civil Marriage Law in Lebanon: The Reaction of the Muslim Communities', paper for the Islamic Marriage Contract conference hosted by the Islamic Legal Studies Program of Harvard Law School, January 1999.

<sup>72</sup> Article 9 of the draft passed by the PLC: "All Palestinians shall be equal before the courts and the law without discrimination on any ground such as race, sex, colour, religion, political opinion or disability." There is no equivalent of Article 10 of the original draft (see *supra* n.) "Women and men shall have equal fundamental rights and freedoms without any discrimination." On this article, the drafter Anis al-Qasem noted that it was inserted as a result of interventions by women's organisations; al-Qasem, *op cit supra* n., p.201.

<sup>73</sup> A. Karam, *Women, Islamisms and the State: Contemporary Feminisms in Egypt*, London 1998, at pp.

been the regular practice in the Arab states to declare that Islam is the religion of the state and *shari`a* the main source or a source of its legislation. Within the Palestinian community, there are various trends on the subject: the secular, the modernist and the fundamentalist. It was thought that such an issue should be decided upon in an atmosphere of freedom when the time comes for the preparation of a permanent constitution.<sup>74</sup>

At the same time, however, the recently appointed Qadi al-Quda was having discussions with the

Gaza mp doc - does refer to equality but all inside Islam  
pmp - aimed at outreach in society and at plc. and now? plc in potent etc  
basic law - already and PLC; qq drafting. others discussing. decree/method of promulgation/ but will still be a hot topic

tactic - decree or what?

As early as 1995, the Qadi al-Quda announced that he was establishing a committee "to look at the laws applied in the [*shari`a*] courts, and to choose the most fitting in order to unify application in the two regions and put an end to the differences that currently exist..."<sup>75</sup> In the spring of 1998 a book published by lawyer Asma Khadr as part of a project seeking to reveal and propose corrections to gender inequalities in all areas of Palestinian law, met with a virulent reaction from certain Islamist sections of society and was denounced from the pulpits of mosques. It appears that this committee did not produce a draft, and in 1998, in response to high profile activities by sections of the women's movement in the West Bank and Gaza, the establishment of another committee was announced by Shaykh Taysir Tamimi, appointed Acting Qadi al-Quda during the prolonged absence of the Chief Islamic Justice himself. In the meantime, in the discussions of the Palestinian Model Parliament: Women and Legislation

began to focus on gender and the law, and to pay particular attention to family law.<sup>76</sup> The work included efforts to improve legal literacy, to research inequality in the existing laws, and to propose amendments. In 1998, with the culmination of a particular project called the Palestinian Model Parliament: Women and Legislation, family law became one of the most heated subjects of debate in Palestine.

and in light of Palestinian women's participation in the national struggle,

A review of the classical rules of Islamic law to remove the duty of the wife to obey her husband, a duty seen as balan

<sup>74</sup> Al-Qasem, *op cit supra* n., p.198.

<sup>75</sup> Abu Sardane, *op cit supra* n.2, p.180 and *Al-Nahar* 11/7/95.

<sup>76</sup> Pal women, national struggle and social agenda etc see

sharia - ref back utayfi, do 1998 discussions and cttees to draft, and basic law.  
 then - final - tactic re her campaign and others: to eliminate in entirely - grass roots  
 and PLC? piecemeal leg never (?) poised by assembly? etc

other aspect it illustrated - way of arguing  
 and - grass roots up? piecemeal etc

The PLC did not, at least until the formal end of the transitional period stipulated in the Oslo Accords ended in 1999, formally read a draft personal status law.

On the other hand, although these other campaigns have addressed topics to do with the structuring of male-female relations and are therefore clearly connected to family law,<sup>77</sup> the specific topics address were not part of family law, but contained within other legislation; and members of the women's movement also point out that these victories remain, so far, in the form of regulations and directives rather than law. and my be overturned rather quickly.

decree: leg discussison; piecemeal Egypt; Tunis Bourghiba not an option, Hatem re Eg feminist; basic law gets sh back in... JLPS temporary law, issued by cabinet duing suspension of parlaiemtn from 1974-84 == constitution requires such leg to be brought before parlmanet when it reconvenes see me p.872

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We thus have two campaigns on specific matters of personal status law announced in 1998 - one aimed at raising the age of marriage and one at eliminating the house of obedience. Of the two, although needing just as much effort and work both in the community and in lobbying the Palestinian Legislative Council (PLC) elected in 1996, the campaign to raise the age of marriage is likely to provoke less controversy in *shar`i* legal circles. If arguments of education, health and well being of the individual woman and, as is frequently pointed out, through her, her future family, find resonance with society and legislators, a public interest argument (*maslaha*) could probably be made to support the raising of the age of marriage - although ensuring that practice conformed to the law would be a different matter.

On the other hand,

- in one sense age marr not a didficult one? sh taysir? (public interest?)
- but coming to obedience and equaltion? - reinterpretations? - this is why so significnat, how argued it, lots of spce to Q arguemtns etc.
- cannot be done by admin decision will need full law?
- drafts of unified law

gaza police unlikely to be allowed to start enforcing? on other hand eliminating vfrom actual law, different. this is why significant re way it was rpeorted and argued.  
 basic law etc  
 admkin decision not LAW (sme as other stuff)

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<sup>77</sup> In the case of passports for example there is a clear connection with the concept of obedience; compare Mayer on

Arafat doing a decree? Bourghiba - successes but he was a dictator. Egypt - all done outside parliament; 1979 opposition by both lots.. Lebanon - recent failure of attempt to have optional civil code.